

What Federal Contractors Need to Know About Executive Order 13950

Oct 22 2020

Practice Area: Labor and Employment

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On September 22, 2020, President Trump issued Executive Order 13950, "Combating Race and Sex Stereotyping" (the "Order"). The Order applies to federal agencies, federal contractors (including "sub to prime" contractors), and federal grant recipients. The Order seeks to "foster environments devoid of hostility grounded in race, sex, and other federally protected characteristics" and eliminate "un-American" and "divisive concepts" from Diversity and Inclusion trainings. The Order is effective immediately, and as explained below, creates new requirements for federal contracts executed on or after November 21, 2020.

Purpose of the Order

The Purpose of the Order is to prohibit federal agencies, federal contractors, and federal grant recipients from providing workplace training to their employees that "inculcates" any form of blame-focused training such as race or sex scapegoating or stereotyping. According to the Order, blame-focused training only serves to "reinforce biases and decrease[] opportunities for minorities." The Order's stated goal is to end the perpetuation of "racial stereotypes and division" in the workplace.

Key Definitions in the Order

Race or sex stereotyping is defined as "ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex."

Race or sex scapegoating is defined as "assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex."

The Order also identifies the following nine prohibited training concepts that are derived from race or sex stereotyping and scapegoating:

1. One race or sex is inherently superior to another race or sex;
2. The United States is fundamentally racist or sexist;
3. An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
4. An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
5. Members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
6. An individual's moral character is necessarily determined by his or her race or sex;
7. An individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
8. Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; and
9. Meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

New Federal Contractor Requirements Under the Order

Mandatory Contract Language. Under the Order, all new contracts entered into with the federal government on or after November 21, 2020, must include specific language detailed in the Order. For example, federal contractors and subcontractors must include in their contracts the federal government language stating that they will not use *"any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating."*

Notice Posting. The Order requires that federal contractors and subcontractors post a notice (to be provided by contracting agencies), for all employees and applicants to see, regarding the contractor's commitments under the Order. If the federal contractor (or subcontractor) has a collective bargaining agreement with a labor union, this notice must be provided to the union. Federal contractors and subcontractors should be on the look out for the release of the notice suggested by the federal government.

Request for Information from OFCCP

On October 21, 2020, the Office of Federal Contract Compliance Programs (the "OFCCP") issued a request for information (the "RFI") that contains additional details and guidance *"regarding the training, workshops, or similar programming provided to employees."* The OFCCP RFI requests that subject employers provide copies of any training, workshop, or similar programming materials having to do with diversity and inclusion as well as information about the duration, frequency, and expense of such activities. The OFCCP also indicated in a stakeholder call on October 21, 2020 that it will provide feedback to Federal Contractors on the compliance of the materials with the Order and will not seek an enforcement action in such instances. However, the OFCCP made clear that should a Federal Contractor not heed their direction, in the event of a random audit, enforcement will be sought for the continuing noncompliance.

Complaints & Investigations for Noncompliance with the Order

The Order also required the OFCCP to establish a national hotline to field and investigate complaints that a federal contractor's or subcontractor's training program violates the Order. In this regard, on September 28, 2020, the OFCCP launched a hotline and email address to receive and investigate complaints under the Order. The Order states that third parties may also file a complaint on behalf of an individual or a group for violations of the Order. The OFCCP is the enforcement agency for the Order and will investigate complaints for non-compliance.

Penalties for Noncompliance

Contractors and subcontractors who violate the Order may be subject to sanctions, such as cancellation, termination, or suspension of the federal contract, and may also be declared ineligible for further federal contracts.

FAQs on Combating Race and Sex Stereotyping

On October 7, 2020, OFCCP published its first guidance on the Order in the form of nine frequently asked questions and answers (the "FAQs").

One key FAQ relates to whether unconscious bias or implicit bias training is still acceptable under the Order. The FAQ asks, *“Does Executive Order 13950 prohibit unconscious bias or implicit bias training?”* The FAQ states, *“Unconscious or implicit bias training is prohibited to the extent it teaches or implies that an individual, by virtue of his or her race, sex, and/or national origin, is racist, sexist, oppressive, or biased, whether consciously or unconsciously.”* The FAQ goes on to state that unconscious or implicit bias training is not prohibited under the Order if it is designed to inform workers, or foster discussion, about preconceptions, opinions, or stereotypes that people—regardless of their race or sex—may have regarding people who are different, which could influence a worker’s conduct or speech and be perceived by others as offensive. This clarifying language appears to indicate that unconscious bias or implicit bias training may still be acceptable under the Order as long as it otherwise complies with the contours of the Order.

It is important to note that there continues to be a grey area in how the OFCCP and DOL will address implicit/unconscious bias training. Comments have been attributed to OFCCP Head Craig Leen that implicit/unconscious bias training is *“perfectly fine”* under certain circumstances, it has been reported that Department of Labor Secretary Scalia made contradictory comments at the same conference on this very issue. Therefore, until clear guidance is provided on the operative parameters of the Order, we urge caution in the training subject to the Order’s requirements.

Takeaways

For now, the FAQs and RFI provide some guidance on the effectuation of the Order. However, it is important to note that additional federal guidance may still be forthcoming. Once we have additional guidance from the DOL/OFCCP, we will be able to address with more certainty the effects of this Order and the risks to Federal Contractors in the operation of their training programs. For now, some of the key takeaways for federal contractors and subcontractors are:

- Carefully review Diversity and Inclusion training material for content that could violate the Order by inculcating any of the divisive concepts described above;
- Be aware that failure to carefully review Diversity and Inclusion training programs could lead to employee complaints, investigations, and in the worst case, cancellation, termination, or suspension of federal contracts;
- Be on the lookout for the forthcoming OFCCP notices and meet all posting obligations;
- Review federal contracts entered into on and after November 21, 2020 to assure the inclusion of the required representations of the Order on employee training;
- Regularly check and monitor the OFCCP website for guidance and updates on the Order; and
- Consult with legal counsel regarding the implications of the Order and best practices in employee training on Diversity and Inclusion.

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